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No. 89-250

In The

Supreme Court of the United States

October Term, 1989

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER,
MARK WEINER, and ROBERT WEINER, SR.,
as Personal Representive of the Estate of Steven Weiner,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit erred in permitting a Florida state court to decide whether its jurisdiction had been preempted by ERISA.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

1. The Decision Below Does Not Raise the Question Presented in the Petition 6

2. The Eleventh Circuit Correctly Applied the *Rooker-Feldman* Doctrine 9

3. ERISA Preemption is Not in Need of Clarification 14

4. The Eleventh Circuit's Decision does Not Demonstrate a Need for Guidance as to the Scope of ERISA's Coverage 18

5. The Eleventh Circuit's Decision Was Also Proper on the Grounds of Abstention 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Aluminum Co. of America v. Utilities Comm'n of North Carolina, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984) 22

Amalgamated Clothing Workers of America v. Richman Brothers, 348 U.S. 511 (1955) 14, 18

Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 12

Bagget v. Department of Professional Regulation Bd. of Pilot Comm'rs, 717 F.2d 521 (11th Cir. 1983) 22

Barry v. Dymo Graphic Systems, Inc., 394 Mass. 830, 478 N.E. 2d 707 (Mass. 1985) 8

Brandenberg v. First Maryland Sav. and Loan, Inc., 660 F.Supp. 717 (D. Md. 1987), *aff'd*, 859 F.2d 1179 (4th Cir. 1988) 22

Brotherhood of Locomotive Engineers v. Massachusetts Commission Against Discrimination, 695 F.Supp. 1321 (D. Mass. 1988) 12

Browning Corp. Int'l v. Lee, 624 F.Supp. 555 (N.D. Tex. 1986) 8

Bruenn v. Aetna Life Ins. Co., 197 Cal. App. 3d 1000, 243 Cal. Rptr. 262 (Cal. App. 2 Dist. 1987) 8

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 15, 18

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 14

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 9, 10, 13

Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) 19, 21

Durfee v. Duke, 375 U.S. 106 (1963) 15

TABLE OF AUTHORITIES – Continued

Page

E-Systems, Inc. v. Taylor, 744 S.W. 2d 956 (Tex App. - Dallas 1988) 8

Fore Way Express, Inc. v. Wisconsin Dept. of Indus., Labor and Human Relations, 660 F.Supp. 310 (E.D. Wis. 1987) 22

Fresh Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353 (9th Cir. 1986) 22

Hathorn v. Lovorn, 457 U.S. 255 (1982) 15

Hobbs v. United States Office of Personnel Management, 485 F.Supp. 456 (M.D. Fla. 1980) 11

Hollins v. Wessel, 819 F.2d 1073 (11th Cir. 1987) 13

Hood v. Prudential Ins. Co., 522 So.2d 265 (Ala. 1988) 8

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 16

International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986) 7, 15

Johansen v. Employee Benefit Claims, Inc., 668 F.Supp. 1294 (D. Minn. 1987) 8

Kalb v. Feuerstein, 308 U.S. 433 (1940) 15, 16

Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982) 17

Marcal Paper Mills, Inc. v. Ewing, 790 F.2d 195 (1st Cir. 1986) 22

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 17

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 7, 8, 14

TABLE OF AUTHORITIES – Continued

Page

Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986) 16

Peick v. Murray, 141 Ill. App. 3d. 1081, 491 N.E. 2d 100 (Ill. App. 1 Dist. 1986) 8

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 21

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 6, 8, 14

Providence Hosp. v. National Labor Union Health and Welfare Fund, 162 Mich. App. 191, 412 N.W. 2d 690 (Mich. App. 1987) 8

Richland Hosp. Inc. v. Raylon, 33 Ohio St. 3d 87, 516 N.E. 2d 1236 (Ohio 1987) 8

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 9

Staley v. Ledbetter, 837 F.2d 1016 (11th Cir. 1988)..11, 13

Stoll v. Gottlieb 305 U.S. 165 (1938) 16

Taggart Corp. v. Life & Health Benefits Administration, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) 21

Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815 (9th Cir. 1985) 8

Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 58 (1987) 11

Texas Employers' Ins. Assoc. v. Jackson, 820 F.2d 1406 (5th Cir. 1987), *modified on reh'g*, 862 F.2d 491 (1988) 17

Transamerica Occidental Life Ins. Co. v. Digregorio, 811 F.2d 1249 (9th Cir. 1987) 8

TABLE OF AUTHORITIES – Continued

Page

Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Assoc., 455 U.S. 691 (1982) 16

Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd. of Public Instruction, 804 F.2d 1059 (8th Cir. 1986) 20

Younger v. Harris, 401 U.S. 37 (1971) 21

STATUTES

Anti-Injunction Act, 28 U.S.C. §2283 .....12, 17

Civil Rights Act of 1964, 42 U.S.C. §2000e 17

Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* 1, 6, 7, 19

Full Faith and Credit Act, 28 U.S.C. §1738 .....16, 17

Labor Management Relations Act of 1947, 29 U.S.C. §185..... 15

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* 17

National Labor Relations Act, 29 U.S.C. §151 *et seq.*..... 7

Voting Rights Act of 1965, 42 U.S.C. §1971 *et seq.* 15

OTHER AUTHORITIES

H.R. Rep. No. 1785, 94th Cong., 2nd Sess. 48 (1977) 20

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Blue Cross and Blue Shield of Maryland, Inc. ("BCBSM"), begs the question that confronted the United States Court of Appeals for the Eleventh Circuit when it introduces the case as one to set aside the judgment of a state court whose subject matter jurisdiction was preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* As

will be set forth below, the case in reality was one to prevent the Florida courts from determining the very issue BCBSM at first prejudged, and then lost. The issue is not whether the Florida courts can proceed without jurisdiction, but whether they can determine if they have it.

In 1982, Respondent Robert Weiner, Sr. purchased health insurance for his family from BCBSM. That summer, one of his sons, Respondent Mark Weiner, was involved in an accident and became a quadriplegic. At about the same time another son, Steve, became ill and was diagnosed as having AIDS. Steve would also become paralyzed before he died.

The boys' health care needs were staggering, but for almost a year they were met with BCBSM's coverage. Then, in 1983, BCBSM denied coverage to both Mark and Steve. This was done through fabricated coverage defenses, and on the basis of terms contained in the master policy which were intentionally contrary to the coverage representations BCBSM made in the benefits book it provided the Weiner family (collectively "Weiners") when the policy was sold. Without insurance coverage, the family subsisted in a trailer with Mr. and Mrs. Weiner trying to take care of their two paralyzed sons, one dying. The ordeal they went through cannot, and fortunately need not, be described in the limited space available here.

In 1984 the Weiners instituted suit against BCBSM and its servicing agent, Blue Cross and Blue Shield of Florida, Inc. ("BCBSF"), in Florida state court. After more than two years of discovery, the case went to the jury on

the Weiners' claims of fraud, intentional infliction of emotional distress and negligence. The jury returned separate verdicts against both BCBSM and BCBSF, finding against BCBSM on all counts. Final judgments were entered by the state trial court in the fall of 1986. BCBSM never raised the issue of ERISA preemption in the state trial court.

BCBSM appealed the state court judgment to the District Court of Appeal of Florida, Fourth District. In obvious recognition of the fact that Florida courts could decide the question of ERISA preemption, BCBSM raised the issue before the Florida appellate court in 1987, contending that the judgment was void because the trial court's subject matter jurisdiction had been preempted by ERISA.

The problem with BCBSM's argument was that the evidence at trial showed that no employee benefit plans existed in connection with Mr. Weiner's purchase of health insurance. While the insurance Mr. Weiner purchased from BCBSM purported to be part of a plan established by the Service Station Dealers of America ("SSDA"), an association of employers, it turned out that this was just a fraudulent marketing scheme. The reality was that the group policy was established and maintained by BCBSM and Associated Financial Services, Inc. ("AFSI"), an insurance broker, to target a perceived market niche. (R. 1-24-1, 2, 89, 101, 103).[1] SSDA was never

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[1] Citations are to the Record below.

consulted about the plan, it never gave BCBSM permission to use its name, and its signature was actually forged on the insurance contracts which made up the plan. (R. 1-24-72-77, 84). The decision to limit the insureds to service station dealers and their employees was an "underwriting decision" made by BCBSM and AFSI (R. 1-24-96), not the product of any employer-employee relationships.

Twelve days after the insurance contracts were forged, an endorsement was issued to the policies eliminating SSDA as both the contracting party and the insured group. AFSI, the insurance broker, was substituted in its place. (R. 1-24-59, 77). Thereafter, no further agreements or endorsements, with the Allied Gasoline Retailers Association of Florida ("AGRA") or any other entity, were made. (R. 1-24-65, 85).

The group insurance policy was then marketed as an SSDA plan, but it was nothing more than an arrangement between two entrepreneurial businesses to sell insurance. It was never established or maintained by an employer or association of employees. Consistent with its true nature, no attempt was ever made to comply with ERISA's reporting requirements.

Mr. Weiner himself ran a service station in Dania, Florida as a sole proprietor. His purpose in purchasing BCBSM's insurance was to provide coverage for his family, and they were the only insureds. (R. 1-24-63, 100; 2-36-69). One son did work for him, but no insurance was purchased for any other employees. Mr. Weiner made no attempt to comply with ERISA's reporting requirements.

In April of 1988, some 18 days before oral argument was to take place in the Florida appellate court, BCBSM

filed an action for declaratory and injunctive relief and a motion for preliminary injunction in the United States District Court for the Southern District of Florida. BCBSM asked the district court to declare the state court judgment void and unenforceable, to temporarily and permanently enjoin the Weiners from attempting to enforce their judgment, and to temporarily and permanently enjoin the Weiners from taking any further action in the Florida appellate court – all on the basis of ERISA preemption.

The district court afforded BCBSM an emergency hearing, received extensive memoranda, and on May 16, 1988 entered an Order Denying Motion for Preliminary Injunction. In addition to denying preliminary injunctive relief, the district court abstained, noting that ERISA preemption was "a far cry from being 'readily apparent'."

BCBSM appealed the district court's decision to the Eleventh Circuit which on April 5, 1989 affirmed the district court's decision to abstain and ordered BCBSM's action dismissed because the district court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine. BCBSM's Suggestion of Rehearing in Banc was denied.

On April 26, 1989 the Florida court issued its decision affirming the judgment against BCBSM and reversing the judgment against BCBSF. With regard to BCBSM's claim of ERISA preemption, the Florida appellate court rejected it because the facts showed there was no employee benefit plan.

REASONS FOR DENYING THE WRIT

1. The Decision Below Does Not Raise the Question Presented in the Petition

BCBSM recasts the case below as one in which the Eleventh Circuit held that a Florida Court could proceed even though its subject matter jurisdiction was preempted by ERISA. But the Eleventh Circuit made no such determination. The issue decided by the Eleventh Circuit was whether the Florida court should be prevented from determining if its subject matter jurisdiction was preempted by ERISA.

When the question is properly presented, the Eleventh Circuit's decision falls into a long line of legislative and judicial pronouncements that state courts may, and indeed must decide whether their jurisdiction has been preempted by ERISA.

The issue before the Florida appellate court when BCBSM sought to enjoin it was not the reach of ERISA preemption, which was clearly defined in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), but whether or not an employee benefit plan existed at all. Congress itself intended for state courts to have the power to make this determination. For example, Congress gave state courts concurrent jurisdiction over actions by participants to clarify rights or obtain benefits due under an ERISA plan. 29 U.S.C. §1132(a)(1)(b), (e)(1). This grant of jurisdiction presumes both the power and the ability to determine if an employee benefit plan exists in the first place. Similarly, Congress provided that state laws regulating insurance would not be preempted by ERISA, but that certain employee benefit plans could not be deemed to be in the

insurance business. 29 U.S.C. §1144(b)(2)(A)-(2)(B). Again, this presumes that state courts will have the power and ability to identify ERISA plans in the enforcement of their own insurance laws.

This Court has also mandated that state courts make the threshold federal preemption decision in the analogous context of preemption under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.*[2] In *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986), an employee filed a common law fraud action against a union in an Alabama state court. The union did not raise the issue of federal preemption until after trial, and the Alabama courts refused to consider it for procedural reasons. In holding that the Alabama courts erred in refusing to consider the issue, the Court commanded that when a claim of federal preemption is raised

> it must be considered and resolved by the state court.

Id. at 393. There is no reason for the rule to be any different with ERISA preemption,[3] and the Florida appellate court was trying to do exactly what this Court mandated in *Davis* when BCBSM sought to enjoin it.

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[2] The Court equated the preemptive power of ERISA and NLRA in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

[3] This is also an inescapable corollary of the Court's decision in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), where an ERISA preemption defense was held to justify federal question removal. Removal is not self-executing, and if the state court action is not removed, as was the case here, the state court must, perforce, resolve the question of ERISA preemption.

Likewise, the lower federal courts have repeatedly stated that state courts can properly determine whether claims before them have been preempted by ERISA. *See, e.g., Transamerica Occidental Life Ins. Co. v. Digregorio,* 811 F.2d 1249, 1255 n.5 (9th Cir. 1987) ("[T]he state courts are perfectly competent to decide this issue"); *Takeda v. Northwestern Nat'l Life Ins. Co.,* 765 F.2d 815, 822 n.10 (9th Cir. 1985) ("[T]he state court to which we remand this case is fully capable to decide issues of preemption if defendants continue to assert them."); *Johansen v. Employee Benefit Claims, Inc.,* 668 F.Supp. 1294, 1297 (D. Minn. 1987) ("If defendants are correct that the *Dedeaux* and *Taylor* cases provide a federal pre-emption defense and that ERISA and not state law controls, the state court will be bound to apply federal law"); *Browning Corp. Int'l v. Lee,* 624 F.Supp. 555, 557 (N.D. Tex. 1986) ("[S]tate courts as well as federal courts are of competent jurisdiction to determine whether a particular plan is governed by ERISA and therefore not by state law").

Finally, the state courts are routinely making this determination and dismissing state claims if they are preempted by ERISA. *See, e.g., Hood v. Prudential Ins. Co.,* 522 So.2d 265 (Ala. 1988); *Bruenn v. Aetna Life Ins. Co.,* 197 Cal. App. 3d 1000, 243 Cal. Rptr. 262 (Cal. App. 2 Dist. 1987); *Peick v. Murray,* 141 Ill. App. 3d 1081, 491 N.E. 2d 100 (Ill. App. 1 Dist. 1986); *Barry v. Dymo Graphic Systems, Inc.,* 394 Mass. 830, 478 N.E. 2d 707 (Mass. 1985); *Providence Hosp. v. National Labor Union Health and Welfare Fund,* 162 Mich. App. 191, 412 N.W. 2d 690 (Mich. App. 1987); *Richland Hosp. Inc. v. Ralyon,* 33 Ohio St. 3d 87, 516 N.E. 2d 1236 (Ohio 1987); *E-Systems, Inc. v. Taylor,* 744 S.W. 2d 956 (Tex App. – Dallas 1988).

Thus, the Eleventh Circuit's decision to let the Florida appellate court decide whether state court jurisdiction had been preempted by ERISA is consistent with the pronouncements of Congress, this Court and the lower federal courts, and is in keeping with the actual practice of the state courts. Moreover, when the decision is seen for what it is, the reasons BCBSM invokes to promote review by this Court disappear. The Eleventh Circuit did not commit an injustice by deciding that the Florida courts could proceed without jurisdiction. The issue of who should decide the ERISA preemption question was decided pursuant to, rather than in the absence of guidance by this Court. And the scope of ERISA's coverage was not even an issue.

BCBSM's real complaint is that the Florida court's factual determination that no ERISA plan existed was incorrect. BCBSM is wrong, but the point at this juncture is that the Florida court's decision does not provide a basis for review of the Eleventh Circuit's decision.

2. The Eleventh Circuit Correctly Applied The *Rooker-Feldman* Doctrine

Because the state court proceedings BCBSM sought to enjoin had already gone to judgment, the Eleventh Circuit rested its decision not to halt the Florida appellate process on the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine, named for this Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), is a product of federalism, and more

particularly of the limited jurisdiction of federal district courts in our dual court system. Specifically,

> a United States district court has no authority to review final judgments of a state court in judicial proceedings.

District of Columbia Court of Appeals v. Feldman, 460 U.S. at 482. Thus, when issues of federal law arise in state court proceedings, their review is left to the state appellate process and ultimately to this Court. A federal district court may not entertain original proceedings which would have the effect of reviewing and overturning a state court judgment.

This is precisely what BCBSM's district court action for declaratory and injunctive relief was designed to accomplish. But BCBSM argues that the Eleventh Circuit erred in relying on the *Rooker-Feldman* doctrine because it only applies to district court review of federal constitutional issues, and not when the federal issue is one of preemption or jurisdiction. No authority is cited for this proposition, and the limitations BCBSM perceives in the *Rooker-Feldman* doctrine are fanciful.

On a conceptual level, the limited jurisdiction of a federal district court does not depend upon the nature of the federal question subsumed in a state court judgment. A federal district court either has original jurisdiction to review state court judgments or it does not. And there is certainly nothing about the ERISA preemption decision, which state courts are supposed to make, that alters the structure of our dual court system.

In application, no court has ever imposed the limits BCBSM would impose on the *Rooker-Feldman* doctrine.

While it is certainly invoked when constitutional challenges are launched against state court judgments, it is also applied when the federal challenge is based upon non-constitutional grounds,[4] and when the federal issue goes to preemption or state court jurisdiction. In *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 58 (1987), Texaco sought to enjoin enforcement of Pennzoil's state court judgment on the ground, *inter alia*, that the judgment was void because Pennzoil's claims were preempted by federal securities law over which the federal courts had exclusive jurisdiction. The Second Circuit held that the district court had no jurisdiction over this aspect of Texaco's claim because it was barred by the *Rooker-Feldman* doctrine. 784 F.2d at 1143.[5]

In *Hobbs v. United States Office of Personnel Management*, 485 F.Supp 456 (M.D. Fla. 1980), a California court had awarded the wife part of the husband's federal pension in a divorce decree. The husband brought an action in federal district court to have the divorce decree declared void on the ground that the California court had

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[4] *See, e.g., Staley v. Ledbetter*, 837 F.2d 1016 (11th Cir. 1988) (challenge based upon constitutional rights as well as Child Welfare Act of 1980).

[5] This Court went on to reverse the Second Circuit's decision that an injunction was proper based upon Texaco's constitutional challenges to Texas' supersedeas requirements. A majority of the Court felt that this aspect of the case was not controlled by the *Rooker-Feldman* doctrine because the requirement of a bond was collateral to the state court's judgment.

no jurisdiction over the Federal Retirement Fund. Summary judgment was granted on the basis of the *Rooker-Felman* doctrine.

In *Brotherhood of Locomotive Engineers v. Massachusetts Commission Against Discrimination*, 695 F.Supp. 1321 (D. Mass. 1988), a union brought an action to enjoin state discrimination proceedings on the ground of federal preemption. The district court abstained, but also noted that it had "no competence to sit in review of state court judgments" because of the *Rooker-Feldman* doctrine. *Id.* at 1324 n.1

And in *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), this Court affirmed the *Rooker-Feldman* principle in the context of federal preemption. The union sought an injunction from the district court on the ground that it had a right to picket under federal law, and that state law was preempted. The decision centered on the Anti-Injunction Act, 28 U.S.C. §2283, but because the union was trying to get the federal district court to review the state court's interpretation of federal law, the Court reiterated that

> lower federal courts possess no power whatever to sit in direct review of state court decisions.

398 U.S. at 296.

These decisions make it clear that the Eleventh Circuit did not misapply the *Rooker-Feldman* doctrine. Further, no conflict of decisions exists, and none is claimed to exist.

BCBSM also challenges the Eleventh Circuit's decision on the ground that the ERISA preemption question

was not "inextricably intertwined" with the Florida court judgment because the issue was never raised in the trial court. No authority is cited for this argument, and for good reason. The *Rooker-Feldman* doctrine is routinely applied when the federal issue raised in the district court was not raised in state court at all, or was raised for the first time on appeal. *See, e.g., District of Columbia Court of Appeals v. Feldman*, 460 U.S. at 482 n. 16; *Staley v. Ledbetter*, 837 F.2d 1016 (11th Cir. 1988); *Hollins v. Wessel*, 819 F.2d 1073 (11th Cir. 1987). At any rate, the point is moot now because BCBSM raised the question before the Florida appellate court, and it was decided.

Beyond this, the question of whether or not the Florida trial court's jurisdiction was preempted by ERISA is obviously inextricably intertwined with its judgment. Apart from the fact that the issue of a court's subject matter jurisdiction is always inherently bound up in its judgment, the factual issues upon which the claim of ERISA preemption depends – the nature of the Weiners' insurance policy, the circumstances under which it was purchased and the relationship between their tort claims and the administration of benefits under the policy, were all litigated in state court and are part and parcel of the final judgment.

Finally, BCBSM's suggestion that the Eleventh Circuit's application of the *Rooker-Feldman* doctrine should be considered "dangerous" because state courts are not competent to decide questions of ERISA preemption is ill-conceived. As discussed in the previous section of this brief, the lower federal courts have repeatedly held that state courts are competent to make this decision, and this Court has rejected the argument "that federal rights will

not be adequately protected in state courts" in the context of federal preemption of state court jurisdiction. *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 518 (1955). *Accord, Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988).

3. ERISA Preemption is Not in Need of Clarification

BCBSM suggests that the Eleventh Circuit's decision demonstrates a need to clarify ERISA's preemptive power because the effect of the decision was to deprive it of a collateral attack upon a Florida judgment. There are two responses to this non sequitur.

First, the preemptive force of ERISA was only recently defined and clarified by this Court in *Pilot Life* and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), and BCBSM has demonstrated no confusion in this regard. To the contrary, the authorities cited in the first section of this brief indicate that ERISA preemption is understood, and that the framework for enforcing it is well established.

Second, BCBSM had no right to a collateral attack. The argument might be legitimate if the Florida court had determined that the claims before it were preempted by ERISA but proceeded anyway, i.e., usurped jurisdiction. But this did not happen. The Florida court simply considered and resolved the ERISA preemption defense on the facts before it. As already discussed, the Florida court had both the power and the obligation to make this decision.

This is further demonstrated by this Court's repeated recognition of the role of state courts in deciding federal preemption defenses, even when the defense goes to the jurisdiction of the state court because of the potential for exclusive federal jurisdiction. In *International Longshoremen's Ass'n v. Davis*, the Court required state courts to consider and resolve NLRA preemption defenses. In *Hathorn v. Lovorn*, 457 U.S. 255 (1982), where exclusive federal jurisdiction over actions under the Voting Rights Act of 1965, 42 U.S.C. §1971 *et seq.*, was at issue, the Court held that state courts had the authority to determine whether the Act applied to actions before them. And in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), where federal preemption under the NLRA and the Labor Management Relations Act of 1947, 29 U.S.C. §185, was at issue, the Court told the employer to make its preemption arguments in state court.

What BCBSM really suggests with its collateral attack argument is that a postscript be added to the rule that state courts have the power to decide federal preemption defenses – that their decisions do not count. The argument is based upon this Court's decision in *Kalb v. Feuerstein*, 308 U.S. 433 (1940),[6] where a collateral attack based upon federal preemption and exclusive federal jurisdiction was permitted. In *Kalb*, however, the state court proceeded in the face of the automatic stay of bankruptcy and refused to consider the question of its own subject

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[6] BCBSM also cites *Durfee v. Duke*, 375 U.S. 106 (1963). But the Court's statement in that case that the doctrine of federal preemption "may in some contexts be controlling", *id.* at 114, was dicta. There was no issue of federal preemption involved in the case.

matter jurisdiction. There is no such usurpation of jurisdiction here, and the difference is manifest. Here, the ouster of subject matter jurisdiction was not automatic, but depended upon a factual determination as to whether or not an employee benefit plan existed. The Florida court did not refuse to consider this issue. Rather, it considered and resolved it, just like it was supposed to do. The principle in *Kalb* does not apply in this situation.

There is simply no justification or authority for sanctioning automatic collateral attacks against state court determinations of ERISA or any other kind of federal preemption defense. The Full Faith and Credit Act, 28 U.S.C. §1738, requires federal courts to give the same preclusive effect to state court judgments as another court of that state would give. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986). The principles of *res judicata* this invokes apply to state court determinations of their own subject matter jurisdiction. When the question of subject matter jurisdiction has been decided, it may be reviewed directly, including requesting this Court to review the matter on a writ of certiorari, but it may not be attacked collaterally. *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Assoc.*, 455 U.S. 691, 706-710 (1982); *Stoll v. Gottlieb*, 305 U.S. 165 (1938).[7]

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[7] The same rule applies when the party collaterally attacking subject matter jurisdiction could have, but failed to raise the issue in the court whose judgment is contested. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9 (1982). This was the situation facing the Eleventh Circuit, but the point is now moot. The question of ERISA preemption has been contested and resolved in the Florida appellate court.

These principles have also been invoked by federal courts when the subject of the collateral attack is a lack of state court jurisdiction due to exclusive federal court jurisdiction. For example, in *Texas Employers' Ins. Assoc. v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *modified on reh'g*, 862 F.2d 491 (1988), the federal plaintiff sought declaratory and injunctive relief to stop a state court action it claimed was preempted by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, a form of preemption the Fifth Circuit found to be as powerful as ERISA or NLRA preemption. The state trial court had already considered and rejected the preemption defense in an interlocutory ruling, but no final judgment had been rendered. The Fifth Circuit declined to accord the state court interlocutory ruling *res judicata* effect, but acknowledged that if the trial had gone to judgment *res judicata* would have barred the federal courts from reconsidering the state court's decision concerning federal preemption. Similarly, this Court gave a state court determination *res judicata* effect in a claim of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, without feeling the need to decide whether the federal courts had exclusive jurisdiction over such claims. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). *Accord, Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).[8]

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[8] Both the Full Faith and Credit Act and the Anti-Injunction Act were enacted by Congress when the dual court system of this country was first being structured. Each proceed from similar concerns about the relationship between federal and

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Finally, BCBSM argues that, without an unabridged right to collaterally attack, the state courts are free to make a mockery of the national policies embodied in ERISA. Apart from ignoring the strong national policy embodied in the Full Faith and Credit Act, the argument proves too much. It presumes that ERISA applies even when state courts, charged with the responsibility of making the decision, determine that it does not. The same type of argument was rejected by this Court in *Caterpillar, Inc. v. Williams*, 482 U.S. at 399 n. 15.

In short, the Eleventh Circuit's decision was also proper on the ground of *res judicata*, and BCBSM's collateral attack argument provides no basis for review.

4. The Eleventh Circuit's Decision does not Demonstrate a Need for Guidance as to the Scope of ERISA's Coverage

BCBSM's assertion that the Eleventh Circuit's decision warrants review so that guidance can be given as to the scope of ERISA's coverage is wide of the mark for three reasons. First, the Eleventh Circuit's decision did

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state courts. In the context of the Anti-Injunction Act, this Court has specifically rejected the argument BCBSM now makes:

> [W]e cannot accept the argument . . . that §2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress'.

Amalgamated Clothing Workers of America v. Richman Brothers, 348 U.S. at 515 (1955).

not even deal with the scope of ERISA's coverage. The question was not whether an ERISA plan existed, but who should decide. BCBSM's complaints regarding the scope of ERISA's coverage are directed toward the Florida appellate court decision, which is not before the Court.

Second, BCBSM does not demonstrate any need for guidance concerning ERISA's coverage. The problem perceived, in its own words, is that "the State Appellate Court ignored established federal court precedent". (Petition, p. 18). The allegation that the Florida court ignored established precedent belies any need for guidance concerning the scope of ERISA coverage.

Third, BCBSM's complaints concerning the Florida appellate court decision ignore the evidence upon which it was based. In order for an employee benefit plan to exist it must be established or maintained by an employer or association of employers for the purpose of providing benefits to employees. 29 U.S.C. §1002(1),(5),(7). Otherwise stated:

> A plan . . . falls within the ambit of ERISA only if the plan . . . covers ERISA participants because of their employee status in an employment relationship, and an employer . . . is the person that establishes or maintains the plan . . . .

Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982).

A group insurance plan does not fall within the ambit of ERISA if it is established and maintained by "entrepreneurial businesses" as opposed to an employer or employee organization. *Donovan v. Dillingham*, 688 F.2d at 1373. This is precisely what happened here. BCBSM's

group insurance plan was established and maintained by BCBSM and AFSI, an insurance company and an insurance broker. The evidence before the Florida court showed that the plan was not established or maintained by SSDA or AFSI. While the plan purported to be an SSDA plan, this was a ruse. This kind of phenomenon, where entrepreneurs sell insurance products to small employers and claim they are ERISA plans, became so widespread that Congress was moved to note that ERISA does not apply in these situations:

> [T]hese plans are established and maintained by entrepreneurs for the purpose of marketing insurance products or services to others. They are not established or maintained by the appropriate parties to confer ERISA jurisdiction, nor is the purpose for their establishment or maintenance appropriate to meet the jurisdictional prerequisite of the act.

H.R. Rep. No. 1785, 94th Cong., 2nd Sess. 48 (1977), *cited in Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd. of Public Instruction*, 804 F.2d 1059, 1063 (8th Cir. 1986).

At the level of Mr. Weiner's service station, an ERISA plan would exist only if he purchased BCBSM's policy for the purpose of providing benefits to his employees because of their status as such. But the evidence was that Mr. Weiner only bought insurance for members of his family, and that he did so only because they were members of his family. He did not buy insurance for his employees.

> ERISA does not regulate purchases of health insurance when there is not a welfare plan.

Donovan v. Dillingham, 688 F.2d at 1375. *Accord, Taggart Corp. v. Life & Health Benefits Administration*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

The Florida appellate court's decision was right on the money.

5. The Eleventh Circuit's Decision Was Also Proper on the Grounds of Abstention

The Eleventh Circuit ordered BCBSM's action for declaratory and injunctive relief dismissed on the basis of the *Rooker-Feldman* doctrine. Dismissal would also have been proper under the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971).

BCBSM's action in the district court sought to enjoin ongoing Florida court proceedings. Specifically, it sought to enjoin the Weiners from attempting to enforce the Florida state trial court judgment and from participating in the appellate process in the Florida courts. Under this Court's decision in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), Florida's "vital" or "important" interest in enforcing the judgments of its courts was implicated, and *Younger* abstention was proper.

As discussed in the first section of this brief, the final element necessary to permit Younger abstention was also present. BCBSM had the ability to present the ERISA preemption question for decision in the Florida courts, and in fact did so.

Finally, the fact that BCBSM's request for an injunction was based upon a claim of federal preemption, ERISA or otherwise, did not render the district court's decision to

abstain an abuse of discretion. Federal preemption, including ERISA preemption, only militates against abstention where it is obvious. The district court here found that ERISA preemption was "a far cry from being 'readily apparent'". Thus, abstention was proper. *See, e.g., Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353, 1361 (9th Cir. 1986); *Marcal Paper Mills, Inc. v. Ewing*, 790 F.2d 195, 197-198 (1st Cir. 1986); *Aluminum Co. of America v. Utilities Comm'n of North Carolina*, 713 F.2d 1024, 1029-1030 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984); *Bagget v. Department of Professional Regulation Bd. of Pilot Comm'rs*, 717 F.2d 521, 524 (11th Cir. 1983); *Brandenberg v. First Maryland Sav. and Loan, Inc.*, 660 F.Supp. 717, 734 (D. Md. 1987), *aff'd*, 859 F.2d 1179 (4th Cir. 1988); *Fore Way Express, Inc. v. Wisconsin Dept. of Inds., Labor and Human Relations*, 660 F.Supp. 310, 313-14 (E.D. Wis. 1987).

CONCLUSION

For the above reasons, it is respectfully submitted that BCBSM's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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